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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 995 and 996

BENTLY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, Individually and as Trustees, etc.,
Petitioners,

vs.

HORACE A. YOUNG, as Trustee in Bankruptcy of the Estate of George R. Joslyn, Bankrupt,
Respondent.

RESPONSE OF HORACE A. YOUNG TO THE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

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Respondent, Horace A. Young, earnestly opposes the petition for rehearing of the petition for certiorari to the United States Court of Appeals for the Seventh Circuit for the reasons hereinafter set forth.

I.

The Certificate Of Counsel Does Not Comply With The Provisions Of Rule 33 Of This Court.

Rule 33 of this Court, provides, in pertinent part:

> "Any petition (for rehearing) filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, footnote 1; *Massey* v. *United States*, 291 U.S. 608), or to other substantial grounds available to petitioner although not previously presented (e.g. *Schriber Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and *counsel must also certify that the petition is restricted to the grounds above specified.*" (Emphasis supplied.)

Counsel for petitioners has failed to comply with Rule 33 in that he has failed to certify, as the Rule says he must, that the petition is restricted to (1) intervening circumstances of substantial or controlling effect, or (2) other substantial grounds available to petitioner although not previously presented.

If this failure to so certify were a mere oversight or inadvertent omission it might be overlooked. However, an examination of the cases cited in the Rule shows beyond all doubt that counsel for petitioners cannot, in good conscience, comply with the Rule. He does not and cannot show that, since the decision in the District Court, or since the decision in the Court of Appeals, or since the order in this Court denying the petition for certiorari, there are

any intervening circumstances of a substantial or controlling nature, such as a later decision by another Court of Appeals, as was the case in *Sanitary Refrigerator Co.*, 280 U. S. 30, 34, footnote 1, or such as the intervening repeal of the Eighteenth Amendment and the consequent implied repeal of the National Prohibition Act, as was the case in *Massey* v. *United States*, 291 U.S. 608. No recent decisions are cited, no change has been made in the Bankruptcy Act, no change has been made in the Illinois Chancery Act, and no action has taken place in the bankruptcy proceedings.

Furthermore, counsel for petitioners does not and cannot show that there are other substantial grounds available to petitioners although not previously presented, such as was suggested in *Schriber Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50, namely, that nothwithstanding the doubtful validity of the patents, litigations elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit. The petition for rehearing does not present any substantial grounds although not previously presented It is a mere restatement of arguments already made.

For failure of counsel to comply with Rule 33 and his obvious inability to so comply, we submit that for this reason alone the petition for rehearing should be summarily denied.

II.

In arguing under Point I that "all Illinois trusts, except those made expressly inalienable, would be subject to destruction by the Court of Appeals ruling," petitioners' principal argument (p. 2) is that *spendthrift trusts* should be protected in bankruptcy proceedings. This argument is utterly irrelevant in this case, *because the Joslyn trusts were NOT spendthrift trusts.*

In advancing this argument, petitioners necessarily (and erroneously) contend (p. 2) that beneficial interests in spendthrift trusts are alienable, but that the bankrupt's beneficial interests in the Joslyn trusts are *not* alienable under Illinois law. The exact reverse is the case. A beneficiary's interests in a spendthrift trust are *inalienable*, whereas the bankrupt's interests in the Joslyn trusts are *alienable*, the Illinois (and Federal) cases so holding being cited at length in both the Court of Appeals' opinion (R. 240-1) and in respondent's answering brief in this Court (p. 7, 15). *None of these cases are even referred to in the petition for rehearing.*

The argument (p. 3) that a beneficiary of a transferable interest in a non-spendthrift trust "may hereafter destroy a trust intended for his benefit" by "deliberately incurring debts and thereafter filing a voluntary petition in bankruptcy" is based solely upon the utterly erroneous contention that the bankrupt could not have transferred (voluntarily) his beneficial interests in the Joslyn trusts without going into bankruptcy (voluntarily or involuntarily). But as indicated above, the Court of Appeals correctly held (1) that the bankrupt's interests *were* voluntarily transferable, and then (2) applied correctly Section 70(a)(5) of the Bankruptcy Act whereby *all* transferable interests of the bankrupt are *without exception* vested in the Trustee in Bankruptcy as administrable property.

The argument (p. 3) that a bankrupt could somehow, by a voluntary bankruptcy, procure the *corpus* of a trust under Section 66 of the Bankruptcy Act is without the slightest merit. The Trustee in Bankruptcy never acquires any greater title than the bankrupt has. If, as in this case, the bankrupt has the right to income only, then the Trustee in Bankruptcy acquires the right to income only, and has no right to the *corpus*.

This there is no basis for the conclusion (p. 3-4) that the decision of the Court of Appeals "will nullify the Illinois statute" by "making possible the destruction of a great number of Illinois trusts." That decision wholly respects Illinois trusts, and merely holds that the *transferable interests* of the fraudulent bankrupt shall, under the direct provisions of Section 70(a)(5) of the Bankruptcy Act, be *administrable* in bankruptcy proceedings.

III.

Petitioners argue under Point II that "The Court of Appeals was without authority to substitute its independent interpretation of Illinois property law." But this the Court of Appeal did *not* do. On the contrary, it applied the Illinois law that the bankrupt's interests were transferable, and then correctly interpreted the Federal Bankruptcy Act (Section 70 (a) (5)) in relation thereto.

Petitioners argue that the District Court Judge, who was reversed was once a Justice of the Illinois Supreme Court and in his "order recited unequivocally that 'this question of law is free from doubt.'" No showing is attempted as to why the Court of Appeals should not reverse an erroneous ruling by a District Court judge on a matter of Federal Bankruptcy Law, even though he happened to have formerly been on the state bench.

Under the above mentioned point petitioners persist in their pretense that this is a "diversity" case, and is not based upon their voluntary consent to jurisdiction of the Federal Court under Section 23b of the Bankruptcy Act. It is too clear for honest dispute that petitioners did voluntarily consent to jurisdiction under Section 23b (R. 194-5, 236-7).

IV.

Eaton v. *Boston Trust Co.*, 240 U.S. 427, cited under Point III, was also cited and discussed in petitioners original brief herein, in respondent's brief in opposition, and in petitioners' reply brief. It is inconceivable that it was overlooked. The *Eaton* case involved a trust which the Massachusetts Supreme Court had previously held was a *spendthrift trust*, and this Court's opinion was based on that holding. The opinion of the Court of Appeals (R. 244) distinguishes the *Eaton* case to the satisfaction of any non-partisan mind.

In view of the many elucidations by this Court of the significance of denial of certiorari, the last of which appears to be *Darr* v. *Burford*, 94 L. Ed. (Adv. Sh.) p. 512, decided April 3, 1950, the argument that the denial of certiorari amounts to an overruling of the *Eaton* case is wholly devoid of merit.

V.

Petitioners first urged this Court to grant certiorari by representing that "the judgment of the Court of Appeals was *a final decision* . . ." (Original Petition, p. 4). They still concede that the jurisdictional holding was a final judgment, but in an endeavor to escape the inevitable consequence of the holding that the trust assets are transferable and therefore administrable assets in bankruptcy, they urge this Court under Point IV to make an explanation that certiorari was denied "for want of jurisdiction." But this Court has not denied certiorari "for want of jurisdiction." On the contrary, this Court has "jurisdiction" to grant such writ at any stage of the proceeding. The Judicial Code, §1254(1) provides that certiorari may be granted "before or after rendition of judgment or decree." It is just that this Court will not exercise its jurisdiction in the preliminary stages of a case.

This whole point is obviously a mere effort to prepare for a possible future petition for certiorari, and to pave the way for it in the Court's mind at this time.

It is not compatible with the practice and procedure of this Court that it gives its reasons why it denies certiorari. The most that could be disclosed would be the reasons of particular judges for not favoring the petition for certiorari. Petitioners present no reason, not previously submitted to this Court, why any such explanation should be given to them. Their ulterior motive in making this request is apparent.

In support of an obvious effort to bargain with this Court, petitioners cite *Chicago & Northwestern Ry. Co.* v. *Osborne*, (1892) 146 U.S. 354, 36 L. Ed. 1002, *Wishkah Boom Co.* v. *U. S.*, (1905) 202 U.S. 613, 50 L. Ed. 1171, and *City of Omaha* v. *The Omaha Water Co.*, (1907) 207 U.S. 584, 52 L. Ed. 351. The last two cases are memoranda dismissing *appeals* for want of jurisdiction. No certiorari question is indicated. The *Chicago & Northwestern* case is hardly more than a memorandum decision and is contrary to the more recent rulings of this Court that issuance or denial of a writ of certiorari is discretionary and contrary to the present provision of Sec. 1254(1) of the Judicial Code.

CONCLUSION.

Wherefore, respondent prays that the above mentioned petition for rehearing be denied.

Respectfully submitted,

HORACE A. YOUNG, *Pro Se,*
Attorney for Respondent.